NO. 45015-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHAVON GARDNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred under ER 402 and ER 403, and denied appellant a fair trial, when it permitted evidence that appellant had previously been charged for violating a protection order.

2. Defense counsel was ineffective for failing to move for a mistrial after jurors heard additional evidence concerning appellant's prior violation.

Issues Pertaining to Assignments of Error

1. Over a defense objection, the trial court permitted jurors to hear a partial recording from a protection order hearing, which revealed that appellant had previously been charged with a crime in connection with a protection order. Where a portion of this evidence was irrelevant and highly improperly prejudicial, did it deny appellant a fair trial?

2. During the testimony of a prosecution witness, jurors also learned that appellant had been arrested and jailed on the prior violation. Did defense counsel's failure to move for a mistrial deny appellant her right to effective representation?

3. To the extent defense counsel contributed to the disclosures made by the prosecution witness, was this also ineffective?

B. STATEMENT OF THE CASE

1. Charges and Trial Evidence

Shavon Gardner and Curtis Parsons had a 12-year relationship that produced a daughter, 9-year-old J.P. RP 50-51. That relationship ended, however, in early 2012. RP 51. On January 31, 2012, Parsons obtained a no contact order prohibiting Gardner from having contact with Parsons or J.P. and prohibiting her from coming within 500 feet of Parsons' residence. RP 75-76; exhibit 3.

Most of the charges in this case stem from events on the morning of June 26, 2012. Parsons was picked up from his home for work and left for the day. RP 53-55. He arranged for a family acquaintance – Amy Bottemiller – to come over and watch J.P. in his absence. RP 56, 180-181. While Bottemiller was taking a shower, and without her knowledge, Gardner arrived and left with J.P. RP 182, 212. A Ford Focus, which Parsons had left parked in the driveway, also was gone. RP 55, 182-183.

Gardner drove the Focus to a friend's home, where she left J.P. before heading back to Parsons' neighborhood. RP 149-155, 212-214. That friend called Parsons to let him know J.P.'s whereabouts and, aware there had been a no contact order, called police to report what had happened. RP 152, 155-156.

Instead of returning directly to Parsons' home, Gardner first visited Parsons' neighbor – Jennifer Johnson – whose fence abuts Parsons' back yard fence. RP 161, 214. Gardner then accessed Parsons' yard from Johnson's yard and entered Parsons' home through a back sliding glass door. RP 162, 214, 223. Once inside, she took items she believed were hers – including boxes of jewelry and clothing – placed them in two bags, and brought the bags to Johnson's house. RP 202-211.

Johnson texted Parsons and let him know what was happening. RP 162. Parsons called Johnson back and said he was calling police. RP 162-163. Gardner was still at Johnson's house when officers arrived. RP 164. Officers searched Parsons' home and found nobody inside. RP 119-120. In the backyard, they found a ladder leaning against the back fence and a chair directly on the other side of the fence in Johnson's yard. RP 113-119.

Officers went to Johnson's house, where they interviewed Gardner. RP 121-122. Initially, she denied entering Parsons' home. RP 122-123. But she then admitted going over the fence and into Parsons' yard to check on her dogs. RP 123. Gardner was then placed under arrest for violating the protection order. RP 124. When asked about the two bags containing items from Parsons' home, Gardner admitted she had entered through the back slider and taken items that belonged to her. RP 125-126. Regarding the Ford Focus parked in front of Johnson's house, Gardner conceded driving it, but explained that Johnson had given her a key to do so. RP 126-128.

When police inventoried the items in Gardner's two bags, many items were clearly Gardner's. RP 97-101, 202. Some items, however, belonged to Parsons, including a driver's license and a social security card. RP 67-74, 147. The ownership of several other items was disputed. RP 67-72, 94-95, 205-206, 209-210.

A month later, on July 26, 2013, Parsons received a postcard from Gardner addressed to Parsons' son, who sometimes lives with Parsons. RP 88-89. The content of the postcard, however, focuses on Gardner's relationship with Parsons. RP 89-91.

The Clark County Prosecutor's Office charged Gardner with multiple crimes: (count 1) Residential Burglary (for entering Parsons' home with the intent to commit a crime); (count 2) Taking a Motor Vehicle Without Permission in the Second Degree (for taking and driving the Ford Focus); (count 3) Theft in the Third Degree (for taking items from inside the house that belonged to Parsons); (count 4) Domestic Violence Court Order Violation (for coming to Parsons' home); (count 5) Domestic Violence Court Order Violation (for having contact with J.P.); and (count 6) Domestic Violence Court Order Violation (for sending the post card). CP 16-18.

At trial, Gardner testified that, although she certainly knew about the January 2012 protection order, Parsons subsequently informed her that he had taken care of the order and that she no longer had to worry about it.[1] RP 199. She also testified that the Focus had been a gift from Parsons and belonged to her.[2] RP 201, 223. She had a key to the car and to the house. RP 203.

Gardner had grown frustrated because Parsons was not returning her calls; she had decided to grab her property and leave

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1 Parsons denied this. RP 227.

2 Parsons testified that Gardner did not have permission to drive the car, although he could not recall if she was listed on the

him for good. RP 202-203, 213-214, 219. Regarding the items she took belonging to Parsons, Gardner testified she did not look inside several boxes that she grabbed. RP 204. She only knew these boxes previously had contained items belonging to her. RP 217-218. And regarding the July 2012 postcard Parsons received, Gardner admitted writing it as an exercise in expressing her thoughts at the time, but she denied placing it in the mail. RP 222.

The defense argued that any violation of the protection order was not a knowing violation because Parsons told Gardner the order had been taken care of. RP 288-290, 293. She was not guilty of burglary or taking a motor vehicle because the State had failed to prove she could not lawfully enter the house or use the car. RP 290-291. And, finally, she was not guilty of theft because any removal of property belonging to Parsons was inadvertent. RP 292.

2. Improper Evidence of A Prior Violation

During Parsons' testimony, the prosecution sought to play a DVD recording of the January 2012 hearing in which the protection order at issue was entered and explained to Gardner. RP 43, 77-78. In the recording, however, Gardner is dressed in a jail uniform and there is a discussion of criminal charges she faced at the time. RP

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insurance policy for the vehicle. RP 52, 105.

43, 78; exhibit 1. Noting the protection order itself had been admitted without defense objection, defense counsel objected to the recording in its entirety, arguing it added nothing of relevance and was prejudicial. RP 48, 78-79.

The court found the recording had limited probative value, but would be the source of substantial prejudice. RP 80. Accordingly, the court permitted the prosecution to play only a limited portion of the audio and not any of the video. RP 80-81. Jurors heard the following exchange from the January 2012 hearing between the judge issuing the protection order and Gardner:

Court: Okay. So, Ms. Gardner, you're restrained from committing any acts of (unintelligible). You're restrained from causing physical harm, bodily injury to the petitioner and the minor, [J.P.]. You're restrained from harassing, following, keeping under physical or electronic surveillance the petitioner, Mr. Parsons, and the minor. You're restrained from coming near or having any contact with persons (unintelligible) by telephone call or by mail the petitioner and the minor, you're excluded from petitioner's residence, work place, school or daycare of the minor, and the petitioner, and the petitioner will have the right to the residence. You're restrained from coming within 500 feet of the workplace, school or daycare. And I indicated on the order that Mr. Parsons is granted temporary care, custody and control of the minor named above until further order of the Court. The Respondent, that's you, shall be allowed visitations to be set by further Court

order. Violation of this order could mean that (unintelligible) further charges filed against you, do you understand?

Gardner: Yes. That means I can't see my kid.

Court: That's correct, not without further Court order.

RP 83-84; exhibit 1 (emphasis added).

Not only did the recording inform Gardner's jury she had previously been charged, during Parsons' testimony, he revealed additional harmful information regarding the prior violation. Defense counsel had Parsons confirm that there were many items in his home that belonged to Gardner. RP 97-98. Counsel then asked if Parsons knew why these items were left in his home and Parsons responded, "Every single thing that she owned when she went to the jail with the first no-contact order was left at my house." RP 99 (emphasis added).

The subject of Gardner's prior arrest came up again a short time later when defense counsel asked if Parsons knew why a key to his home was found in Gardner's purse. Parsons responded, "Maybe she had it on her possession the first time she got arrested, I have no idea." RP 101-102 (emphasis added). Defense counsel did nothing to rectify the impact of this evidence.

Jurors convicted Gardner on all counts except count 3 (Theft in the Third Degree). CP 58, 60-64. By special verdict, jurors also found the Residential Burglary and Taking a Motor Vehicle offenses were aggravated domestic violence crimes. CP 65-66. On those two felony convictions, the court imposed a standard range sentence of 43 months. CP 80. On the three gross misdemeanor convictions for violating a court order, the court imposed concurrent 364-day sentences, which were suspended for two years. CP 69.

Gardner timely filed her Notice of Appeal. CP 90-91.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT PERMITTED JURORS TO LEARN THAT GARDNER FACED "FURTHER CHARGES" IF SHE VIOLATED THE PROTECTION ORDER.

Over defense objection, the trial court permitted jurors to hear a portion of the recorded hearing where the Clark County Superior Court issued the protection order in January 2012. RP 78-81. This included the judge telling Gardner that any violation could mean "further charges." RP 84. This denied Gardner a fair trial.

Evidence must be relevant to be admissible. ER 402. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." ER 401.

Even if relevant, however, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." ER 403. Unfair prejudice "'is that which is more likely to arouse an emotional response than a rational decision by the jury,'" or an undue tendency to suggest a decision on an improper basis. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)).

The trial court's balancing of probative value and prejudicial impact, and its decision to admit evidence, is reviewed for abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997); State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

The relevance of that portion of exhibit 1 played for jurors was that it established Gardner's presence at the January 31, 2012 hearing, demonstrating that she had knowledge of the order and its prohibitions. RP 79-80. The court properly recognized the probative value as "limited" because the order itself, which included Gardner's signature, had been admitted without defense objection

and already indicated her presence and knowledge. RP 48, 80; exhibit 3, at 4.

There was no probative value, however, in allowing jurors to hear that portion of the protection order hearing in which the judge told Gardner that any violation could mean "further charges." RP 84. The warning that Gardner could be charged for any violation was already contained on the order itself. Exhibit 3, at 4. Informing jurors of potential "further charges" revealed that Gardner had already been charged for a violation. This was irrelevant. It did not make the existence of any fact of consequence more or less probable. The resulting prejudice, however, was significant. It portrayed Gardner as a repeat violator; i.e. one who ignores the court's authority; and, therefore, one more likely to have committed the current charged crimes.

The erroneous admission of evidence requires reversal if "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Wilson, 144 Wn. App. 166, 178, 181 P.3d 887 (2008) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). The error is harmless "if the evidence is of minor significance when compared with the evidence as a whole." Wilson, 144 Wn. App. at

166 (citing State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

Evidence that Gardner had already been charged in connection with a no contact order was not of minor significance. Her defense to the charges for which she was convicted turned on her ability to convince jurors that she could lawfully enter Parsons' home and lawfully drive the Focus. It also turned on her ability to convince jurors she did not knowingly violate the protection order because she had been informed the order was no longer an issue. That she had previously been charged with a similar violation, however, made it less likely jurors would accept her version of events and, instead, would find Parsons' version more credible. It portrayed her as a serial violator, unwilling to comply with the law despite a court order.

On this ground alone, Gardner should receive a new trial.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL ONCE JURORS RECEIVED ADDITIONAL EVIDENCE OF GARDNER'S PRIOR VIOLATION.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her

attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

It was bad enough that jurors learned – through the playing of a portion of exhibit 1 – that Gardner had previously been charged in connection with a protection order. But jurors learned more during Curtis Parsons' testimony.

As discussed above, during cross-examination by defense counsel, Parsons testified, "Every single thing that she owned when she went to the jail with the first no-contact order was left at my house." RP 99. And when asked about the fact Gardner had a key to Parsons' home, Parsons testified, "Maybe she had it on her possession the first time she got arrested, I have no idea." RP 101-102.

In light of this additional evidence concerning Gardner's criminal past, no reasonable attorney would have failed to move for a mistrial. Not only did this testimony support the existence of a

prior charge involving another protection order (already alluded to in that portion of exhibit 1 played for jurors), it added the fact Gardner was arrested and actually served time in jail on that charge. Counsel's failure to act in light of these revelations was deficient.

In response, the State may point out that it was defense counsel's questions that elicited this inadmissible evidence. Counsel's questions, however, did not require Parsons' revelations about Gardner's arrest and incarceration. The first question – if Parsons knew why Gardner's jewelry was still at his house – called only for a yes or no answer. RP 99. Similarly, the second question – if Parsons knew why Gardner had a house key – called only for a yes or no answer. RP 101. But to the extent counsel can be said to be responsible, this also was deficient performance. There was no legitimate tactic in eliciting this information. In any event, regardless of counsel's role, defense counsel had an obligation to rectify any error by moving for a mistrial. He failed to do so.

Gardner suffered prejudice because, had counsel moved for a mistrial, the trial court would have been obligated to grant the motion. When examining a trial irregularity, the question is whether the incident so prejudiced the jury that the defendant was denied

his right to a fair trial. If it did, a mistrial was required. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Courts examine (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

First, the irregularity was very serious because it injected into the trial additional improper evidence concerning prior criminal misconduct. Not only was this evidence inadmissible under ER 402 and ER 403, it was inadmissible under ER 404(b), which prohibits evidence of prior crimes or wrongs "to prove the character of a person in order to show action in conformity therewith." Alone, and certainly in conjunction with the disclosure from exhibit 1, evidence that Gardner had previously been ordered to stay away, previously violated the order, was previously arrested, and previously served time in jail would have affected jurors' abilities to be fair and impartial when considering the current charges.

Second, the evidence was not cumulative of any properly admitted evidence.

Third, there was no request for a curative instruction. But the trial court would have been required to examine whether an

instruction *could* cure the prejudice. Escalona, 49 Wn. App. 254-55. In Escalona, this Court noted that "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). As in Escalona, the evidence of Gardner's prior arrest and confinement for violating a protection order was inherently prejudicial.

Because Parsons' improper testimony was a serious irregularity, was not cumulative of any proper evidence, and could not be mitigated with a jury instruction, the trial court would have been required to grant a defense motion for mistrial.

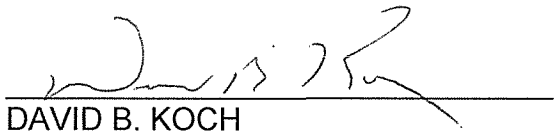
D. CONCLUSION

The trial court denied Gardner a fair trial when it permitted jurors to learn that she had previously been charged for violating a protection order. Defense counsel was ineffective for failing to move for a mistrial once jurors also learned that Gardner had been arrested and served time in jail for the prior violation. Gardner's convictions should be reversed and her case remanded for a new and fair trial.

DATED this 30th day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION TWO

STATE OF WASHINGTON,	)	
Respondent,	)	
v.	)	COA NO. 45015-1-II
SHAVON GARDNER,	)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATE MAIL.

[X] SHAVON GARDNER
DOC NO. 356665
MISSION CREEK CORRECTIONS CENTER FOR WOMAN
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BELFAIR, WA 98528

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JANUARY 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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